

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:

ADDS 312 IAC 9.5 TO ESTABLISH AN OPTION)	Administrative Cause
FOR IN-LIEU FEE TO MITIGATE ADVERSE)	Number: 13-088W
IMPACTS TO FISH, WILDLIFE, OR BOTANICAL)	
RESOURCES)	LSA Document #13-528(F)

**REPORT ON RULE PROCESSING, PUBLIC HEARING, AND HEARING OFFICER
ANALYSES WITH RECOMMENDATIONS REGARDING FINAL ACTION**

1. RULE PROCESSING

For consideration is the proposed new rule 312 IAC 9.5 to establish an option for the payment of a fee (known as “in-lieu” fee) to mitigate unreasonable detrimental impacts to fish, wildlife, or botanical resources for activities authorized in permits issued by the DNR under the Lakes Preservation Act (IC 14-26-1), Flood Control Act (IC 14-28-1), and the Navigable Waterways Act (IC 14-29-1). The new rule would allow an applicant for a permit from the DNR to provide payment to the Indiana Natural Resources Foundation to mitigate for impacts to fish, wildlife, or botanical resources resulting from the project.

The Natural Resources Commission (“Commission”) gave preliminary adoption to the proposed amendments on July 16, 2013. As reported in the pertinent portions of the July 16 minutes:

Request for preliminary adoption of new rules in 312 IAC 9.5 to establish an option for an in-lieu fee to mitigate adverse impacts to fish, wildlife, or botanical resources for activities authorized by a permit issued by the Division of Water under IC 14-16-2, IC 14-28-1 or IC 14-29-1; Administrative Cause No. 13-088W. Review of and possible action on proposed nonrule policy document providing standards for administration of in-lieu fee; Administrative Cause No. 13-107W

Linnea Petercheff, Staff Specialist in the Division of Fish and Wildlife, presented this item. Proposed 312 IAC 9.5 would establish an option for mitigation for permits for construction in a floodway, public freshwater lakes, and navigable water. State statutes require review of permit applications for impacts to fish, wildlife, and botanical resources. She explained the Department receives mitigation plans that indicate how the habitat will be restored or established to mitigate for the loss as a result of a project. Typically, mitigation is done on or

near the project site or at least in the watershed. Three options for mitigation would be available at 312 IAC 9.5-2-4. The first option is the permit applicant would provide mitigation on the project site as is the current practice. The second option is the permit applicant would use an approved mitigation bank. In the third option, the applicant would provide payment of an in-lieu fee. "The in-lieu fee option would allow an applicant to submit payment to the Indiana Natural Resources Foundation to serve as the mitigation. Those funds would be used to establish or restore habitat for fish and wildlife resources." Petercheff noted other states, such as Kentucky and North Carolina, already have an in-lieu fee program, to mitigate for permits through the U.S. Army Corps of Engineers. "INDOT is also interested in this. [It is] working with the Corps. IDEM and our staff right now are in the process that Director Clark mentioned earlier with the RFP and the instrument that the Corps requires for its in-lieu fee option."

Petercheff said applicants who would be approved for in-lieu fees would be required to submit an amount that would be approved by DNR. The Department has drafted a nonrule policy which would list fees for each habitat type and each region. "Since this is a new program in Indiana, we do not want to put the fees in the rule, but we wanted to place them in a policy to provide some flexibility as we get started." The draft nonrule policy in the Commission's packet would provide additional details about program administration and would give examples of the criteria used to determine how the funds would be spent. The draft nonrule policy lists nine natural regions and would be presented to the Advisory Council for further review. An amended nonrule policy document, which including the fees, would be brought before the Commission for approval at a later meeting. Petercheff said the DNR requested preliminary adoption of the proposed 312 IAC 9.5. The Commission could also approve the draft nonrule policy document.

Petercheff said the proposed rule would provide in-lieu fee as one option, "but not the primary option, but simply one option for applicants for these DNR permits. We still want them to try to do the mitigation onsite, but they would also have the mitigation bank as another option."

The Chair asked Petercheff to clarify the Department's request regarding the proposed rule and nonrule policy document.

Petercheff responded the DNR is asking the Commission to give preliminary adoption to proposed 312 IAC 9.5. She said the draft nonrule policy document is a working document. The Commission could approve the policy document today, or it could be considered for approval at a later date with the draft nonrule policy document "considered as background information to see how we plan to incorporate this program in the future". Either way, fees would be added later.

John Davis said the preliminary adoption that the Department is asking for today is a rule...that sets the framework for allowing the Department to do offer an in-lieu fee. Davis added the DNR is seeking preliminary adoption of 312 IAC 9.5 today. The Department will request the Commission to approve a nonrule policy at a later date. "Here is a draft" of the nonrule policy document. "But I would prefer that you didn't [approve] it today. I would rather have you...read it to understand the process and comment back to us as soon as you feel comfortable doing that on whatever issue there is." Davis added, "We are going to stress again and again that we are not replacing 'avoid, minimize, and mitigate', the kind of 'golden rule' of disturbance of sensitive areas.... But when you mitigate, you would also have an in-lieu fee option."

Patrick Early reported the Advisory Council discussed the proposed rule, and "to our group, the concept seems really solid. You're not telling them they can't do the mitigation themselves. You are giving them the option of not doing the mitigation themselves if they are willing to pay this in-lieu fee. I think it [allows the Department] to be a lot more strategic about the way we do reclamation and probably do bigger projects, pooling them together in some ways. Of course, decisions need to be made about how you actually make those decisions." He said the biggest concern for the Advisory Council was the determination of the fee. "When [the Advisory Council] talked about it..., the first the idea was to allow the contractor to propose the fee themselves, and we decided that would be a disaster.... We are trying to figure out what the right way is to come up with the fee. How do you decide what that amount is?" An applicant who was not satisfied with the amount of an in-lieu would have the option to complete the mitigation itself. The Advisory Council "thinks the in-lieu fee is a really good idea, and it seems like it is going in the right direction.... Preliminarily adopting at least the rule would be a good idea..., and it makes sense" to defer approval of the nonrule policy document for further review.

Thomas Easterly said, "I want to make sure that this is the first step, because we are trying to do that other in-lieu program that Cam [Clark] talked about a few minutes ago. I was shocked that you can use this for wetlands mitigation. I do understand that we need to bite off a little piece at a time, but we need to somehow legalize a similar program when we finish that other process."

Davis agreed. He said DNR, INDOT, and IDEM met recently, and processes are moving along parallel lines. "This is the first step for us. We know that we would be simpler, but we also knew we had to be able to fit into what we decide on the bigger one." The parallel in-lieu program requires agreement from the U.S. Army Corps of Engineers. "We are hiring a consultant, and of course, the Louisville Corps Office has already agreed to a Kentucky plan. That's a real leg up, it seems like."

Donald Ruch asked, "Is it possible that through this in-lieu fee that we could lose acreage, in that, they pay a fee, and we use that to enhance existing wetlands, for example, at the cost of producing new wetlands?"

Davis said, "I don't think there will not be a net loss because that comes from that other process, that Federal process.... Every time that someone replaces, they do give credit for an enhancement. One theory is you could take something that wasn't a bottomland hardwood forest and turn it into that, and you wouldn't have a net gain of acreage, but you would have a net gain of a certain kind of acreage.... We are also talking about one of the advantages of [the in-lieu fee] is you can pool money. A little disturber could pay some dollars and another little disturber and then we could do a bigger or more a more meaningfully or more strategically placed project. It will be very difficult to not only balance the dollars that have come in for a disturbance versus the outgo in that particular watershed and the replacing the function of what we are trying to replace if we also add an acreage calculation. That's what we are talking about. How do we buffer all those different influences?"

Easterly said, "Sometimes people agree to do the projects and then they don't. Yes, you can go through enforcement and get an order, but you still don't have the thing on the ground. At other times, they do, do them, but they weren't well thought out. They don't really provide the value that DNR's management will provide to these projects."

Barb Simpson, Executive Director of the Indiana Wildlife Federation ("IWF"), commented that the in-lieu fee programs "can be very good.... From our point of view, they are very helpful and the trick is to do them right. One of the key pieces to do them right is to make sure that the fees charged adequately cover the entire fully-loaded costs." An in-lieu fee program supports reduction of habitat fragmentation. "We are very much in favor of this if it is done right." She noted the proposed rule needs to be clarified. The Commission should make clear the in-lieu fee is "not the first choice. This program needs to be the last choice, if possible." The IWF is concerned fees will be set "so low to make it simpler for business to progress that, in fact, we can't really get the job done. It'll be the first choice and will be used as an easy out." The agency needs to think through why a proposed in-lieu fee would be accepted or rejected "to make sure that we don't have too low of barrier to reject it or allow it."

Simpson said the Kentucky in-lieu fee program was initiated due to "valley-fill" occurrences when "coal companies would fill in an entire valley and wipe out an entire stream. There's lots of money involved in those in-lieu mitigation programs. Our situation is a little bit different. If we look at the details of Kentucky and see a lot of money, I'm not sure that there will be that much money in it for us, but is still a good program to do."

Simpson said that the IWF supports the Division of Fish and Wildlife administration of the in-lieu fee program. "Those folks have the expertise. They know how to do these programs." But the Division of Fish and Wildlife is funded through hunter and angler license fees. She cautioned that with the additional administrative responsibility associated with the in-lieu fee program, the program should be fully staffed, independent, and not drain on the Division's resources.

Referring to 312 IAC 9.5-3-1(c)(2), Simpson noted watersheds designated as HUC-8 (hydrologic unit code) are "pretty big watersheds.... What we are concerned about is we wouldn't want to have...mitigation issues in the northeastern part of the State and, in fact, we are going to fix it down in the southwestern part of the State. I think we have to watch...how we balance consolidation or not."

Simpson concluded, “Make sure the fee is high enough.” Incorporate the fee structure in a nonrule policy document. Contingency fees should be reviewed. “Restorations and mitigations notoriously fail. It is very hard to get them right when you’re talking about stream and wetland restoration. You have to build in enough contingency fee to take care of that. Some States start out at 5%, but they always end up around 20%. It just takes that kind of money to do it.” She said she also was not clear on the program’s impact to IDEM.

Tim Maloney, with the Hoosier Environmental Council (“HEC”), said HEC also supported the proposed rule. But HEC “wants to make sure that an in-lieu fee program provides an effective mechanism for replacing the types, amounts, and functions of the resources lost”. The level of fees charged should fully administer the program in terms of administration cost and staff. The Indiana Natural Resources Foundation and the Division of Fish and Wildlife should have sufficient resources and capacity to administer the program properly “in that we don’t just end up with fees collected and not having the ability to follow through and make sure that mitigation projects go forward”. HEC wants to reinforce the “golden rule—the idea of sequencing and evaluating projects and any mitigation that may be required for those projects, in that, compensatory mitigation is farther down in the sequence after the avoidance of impacts and minimization of impacts. If those two goals can’t be achieved, then we compensate for the impacts.” He also recommended the proposed nonrule policy document be an amendment to the existing Commission nonrule policy document, Floodway Habitat Mitigation (Information Bulletin #17 (Second Amendment); 20120801-IR-312120434NRA) “so that linkage between the overall implementation of compensatory mitigation is recognized in the guidance for this particular in-lieu fee mitigation proposal”.

The Chair stated, “I think this issue has been well-discussed. I know the Advisory Council spent a lot of time reviewing this, and there will be more time to come.” He then recommended a motion be made for preliminary adoption of the rule amendments as proposed, and to table further action on the proposed nonrule policy document for reconsideration by the Commission at a later date.

Vice Chair Stautz noted the draft nonrule policy document indicates at Section 3 a review team will be established. “It may be helpful if [the Department and the Indiana Natural Resources Foundation] can think through membership terms, representation on that, and the different groups as they look at the nonrule policy document.”

Patrick Early moved to give preliminary adoption to 312 IAC 9.5 to establish an option for an in-lieu fee to mitigate adverse impacts to fish, wildlife, or botanical resources for activities authorized by a permit issued by the Division of Water under IC 14-16-2, IC 14-28-1 or IC 14-29-1. Thomas Easterly seconded the motion. Upon a voice vote, the motion carried.

Executive Order 13-03 required agencies to “suspend rulemaking action on any proposed rules for which a notice of intent to adopt a rule...was not submitted to the office of the Indiana *Register* on or before January 14, 2013.” Additional compliance provisions were included in Financial Management Circular 2013-01. Cameron Clark, Director of the Indiana Department of Natural Resources (“DNR”), submitted to the Office of Management and Budget (“OMB”) a “Request for exemption to the suspension of rulemaking action under the provisions of Executive Order 13-03” for this rule proposal. On July 1, Christopher D. Atkins, Director, Office of Management and Budget, wrote that DNR’s “request qualifies for an exception under Section 6(b) of Executive Order 13-03. Therefore, DNR may proceed”.

The “Notice of Intent” to adopt the new rule was published in the *Indiana Register* at 20131113-IR-312130528NIA on November 13, 2013. The notice identified Linnea Petercheff, with the Division of fish and Wildlife, as the “small business regulatory coordinator” for purposes of IC 4-22-2-28.1.

The Commission caused the information required by IC 4-22-2-22.5 to be included in the rulemaking docket maintained on its website at <http://www.in.gov/nrc/2377.htm>. The rulemaking docket was also updated periodically as the rule adoption progressed.

As specified by the Executive Order that then applied, proposed fiscal analyses of the rule proposal, and the rule standards analysis under IC 4-22-2-19.5 were submitted, along with a copy of the proposed rule language and a copy of the posted Notice of Intent, to OMB and the Administrative Rules Oversight Committee (“AROC”) on November 14, 2013. On February 14, 2014, the DNR forwarded to the Commission a letter from Brian E. Bailey, Director, State Budget Agency, stating, in part, “After reviewing the proposed rule, the recommendation of the State Budget Agency is that the rule changes be approved.”

On March 5, 2014, the Division of Hearings submitted the rule proposal to the Legislative Services Agency (“LSA”), along with the “Statement Concerning Rules Affecting Small Business” (also known as the “Economic Impact Statement”). The Notice of Public Hearing and the Justification Statement (IC 4-22-2-24(d)(3)) were submitted to LSA on the same day. On March 19, 2014, the following were posted to the *Indiana Register*: the text of the proposed rule (20140319-IR-312130528PRA); the notice of public hearing (20140319-IR-312130528PHA); and the Economic Impact Statement (20140319-IR-312130528EIA). Following receipt from LSA of an “Authorization to Proceed”, the Division of Hearings caused Notice of Public Hearing to be published on March 14, 2014 in the Indianapolis *Daily Star*, a newspaper of general circulation in Marion County.

The Statement Concerning Rules Affecting Small Businesses (the “EIS”), as required under IC 4-22-2.1-5, and submitted by the Small Business Regulatory Coordinator, indicates:

Economic Impact Statement
LSA Document #13-528

IC 4-22-2.1-5 Statement Concerning Rules Affecting Small Businesses

Estimated Number of Small Businesses Subject to this Rule:

110. The DNR believes that approximately 110 applications for the in-lieu fee option will be submitted by having this new option in [312 IAC 9.5-3-1](#).

Estimated Average Annual Reporting, Record Keeping, and Other Administrative Costs Small Businesses Will Incur for Compliance:

\$480 per year (\$20 per hour multiplied by 24 hours) for a business that submits an application for the in-lieu fee option. This cost would incorporate compiling the information necessary to complete the application form and submit it to the DNR.

Estimated Total Annual Economic Impact on Small Businesses to Comply:

\$480 per year for administrative costs, but total economic costs cannot be determined. The costs for in-lieu fee are only required when mitigation is required for a permit applicant, and the applicant requests to use the in-lieu fee option to serve as mitigation for a project in which a permit is required under the Lakes Preservation Act ([IC 14-26-2](#)), Flood Control Act ([IC 14-28-1](#)), or Navigable Waterways Act ([IC 14-29-1](#)). The costs are dependent upon the type of habitat being mitigated (such as forested wetland), and the location in the state.

Justification Statement of Requirement or Cost:

Mitigation is required to offset unreasonably detrimental impacts to fish, wildlife, and botanical resources pursuant to [IC 14-28-1-22](#) and [312 IAC 10-2-39](#). Additionally, the Natural Resources Commission has an information bulletin for floodway habitat mitigation that sets forth specific requirements for mitigation for construction in a floodway. Instead of having to identify a mitigation location, prepare a mitigation plan, do mitigation on-site with the planting of trees or other vegetation, and conduct monitoring for several years, an applicant will have the option of paying a fee to the Indiana Natural Resources Foundation instead with these new rules. Identifying appropriate mitigation lands can be time consuming for applicants and involve significant staff time to evaluate the locations as well. Mitigation plans are typically very detailed and include lists of plants, including their size, location, and spacing when planted, and a monitoring plan to ensure that the plants grow as required in the mitigation plan. If an applicant can pay the fee required instead of submitting a detailed mitigation plan that includes finding land to do the mitigation, planting the trees and other vegetation, and multiple years of monitoring, an applicant will likely save time and effort.

The Indiana Department of Transportation (INDOT) has requested that the DNR provide this option for mitigation, especially for large highway projects that cross multiple counties. Paying an in-lieu fee will eliminate the need for INDOT to hire other companies to prepare a detailed mitigation plan as part of the permit application process. INDOT will also not be required to hire other companies to conduct the annual monitoring and any corrective actions.

This in-lieu fee option will be available to all DNR permit applicants and is likely to be used by companies that have projects that span multiple counties (such as pipelines) or have projects in counties that are urban where land for mitigation is hard to find, without having to find mitigation sites in each county.

Regulatory Flexibility Analysis of Alternative Methods:

• Explanation of Preliminary Determination:

An alternative can be to not require a floristic quality assessment by a permit applicant, but the Nature Conservancy, Hoosier Environmental Council, and Indiana Wildlife Federation have all expressed concerns publicly about this new program. In order for the Natural Resources Commission to approve these new rules and ensure that fish and wildlife habitat will not be lost through this mitigation option, it is necessary that the DNR have a standardized method of evaluating the quality of the habitat to assist with determining the fee required for this program.

The only effects on business are for those that need a permit from the DNR to do construction in a floodway or in a navigable waterway, or along the shoreline or in a public freshwater lake, and have to do mitigation to offset unreasonably detrimental impacts to fish, wildlife, and botanical resources. Not all permit applications require mitigation. This is a third option for mitigation; it is a new option of submitting payment through an application process instead of developing and completing the work in a mitigation plan or going through a mitigation bank. Mitigation plans can take more time and effort to complete and monitor for several years. A

business or local government entity that applies for a permit will likely save time and could save some money over time. A typical mitigation plan can cost thousands of dollars and include obtaining an easement on other property to complete the work and monitor it for three to 10 years, whereas the in-lieu fee option in [312 IAC 9.5-3-1](#) will require a one-time floristic quality assessment, completion of an application form, and submission of the required amount of money for the amount and quality of habitat impacted.

- Supporting Data, Studies or Analyses: There were no studies or analyses relied upon for this determination. The number of businesses that are expected to apply for this in-lieu fee option is 25% of the number of permit applicants in Fiscal Year 2013 (436).

On March 6, 2014, the Economic Impact Statement was forwarded to the IEDC, through the Office of the Lieutenant Governor's Indiana Office of Small Business and Entrepreneurship (the "OSBE"). On March 13, 2014, Jacob Schpok, Executive Director, OSBE, wrote to the Commission: "The economic impact statement...indicates there is a \$480 per year for administrative costs, but total economic costs cannot be determined. The costs for in-lieu fee are only required when mitigation is required for a permit applicant, and the applicant requests to use the in-lieu fee option to serve as mitigation for a project in which a permit is required.... The costs are dependent upon the type of habitat being mitigated..., and the location in the state. OSBE does not object to the economic impact to small business associated with the proposed rule". On March 17, 2014, the Commission responded by email to the OSBE: "Thank you for your timely and thorough comments under IC 4-22-2-28. Since you have commented favorably upon the agency's fiscal analysis, and have suggested no alternatives, it will be recommended that the...Commission move forward with consideration for final adoption." On the same day a copy of the OSBE correspondence was uploaded to the Commission's website at www.in.gov/nrc/2377.htm.

2. WRITTEN COMMENTS

No written comments were received through the Commission's online comment form or through regular mail.

3. PUBLIC HEARING

The April 15, 2014 public hearing was convened as published. At the beginning of the public hearing, the Hearing Officer announced the comment period would close at the end of April 30, 2014. The close of the public comment period was also posted on the Commission's online rule

docket at <http://www.in.gov/nrc/2377.htm>. Linnea Petercheff from the DNR, Division of Fish and Wildlife, attended the public hearing. No other member of the public was in attendance.

5. HEARING OFFICERS ANALYSES WITH RECOMMENDATIONS REGARDING FINAL ADOPTION

The Division of Water is the licensing authority for IC 14-26-2 (sometimes referred to as the “Lakes Preservation Act”), IC 14-28-1 (sometimes referred to as the “Flood Control Act”) and IC 14-29-1 (sometimes referred to as the “Navigable Waters Act”). The Division of Fish and Wildlife also reviews applications for each of these Acts with respect to impacts to fish, wildlife or botanical resources. Mitigation is required to offset unreasonably detrimental impacts to fish, wildlife, and botanical resources pursuant to IC 14-28-1-22 and 312 IAC 10-2-39. Mitigation plans are often required and submitted that set forth the plans to restore and establish habitat as a result of a permitted project, and the habitat is usually onsite or near the construction site and within the watershed. A permittee currently has two options regarding mitigation obligation: (1) complete mitigation to establish, restore, or a combination thereof, habitat for fish and wildlife resources; or (2) the use of an approved mitigation bank. The proposed rule would allow a permittee a third option to submit a payment to the Indiana Natural Resources Foundation to serve as the mitigation for these impacts. The funds would be used to establish or restore, or a combination of habitat for fish and wildlife resources.

Before publication of the proposed rule in the Indiana *Register*, the version of 312 IAC 9.5-3-2 given preliminary adoption by the Commission was clarified to include subdivisions (4) and (5). Subdivision (4) makes explicit that the DNR may disapprove an in-lieu fee request if a federal agency or another state agency denies in-lieu fee mitigation for the same project. Subdivision (5) makes explicit that the DNR may disapprove an in-lieu fee request if the restoration cannot be completed in the service area. “Service area” is a term used by the U.S. Army Corps of Engineers to describe where the on-site mitigation can be completed. DNR’s Division of Fish and Wildlife informed the hearing officer it intends to prepare, and to submit to the Commission for approval, a companion nonrule policy document to support public understanding of the in-lieu fee mitigation program, including a fee schedule, if the rule proposal is given final adoption.

The proposed new rule, 312 IAC 9.5, appears to be appropriate as presented in “Exhibit A” for consideration as to final action.

Dated: July 7, 2014

Jennifer M. Kane
Hearing Officer

EXHIBIT A

TITLE 312 NATURAL RESOURCES COMMISSION

Final Rule
LSA Document #13-528(F)

DIGEST

Adds 312 IAC 9.5 to establish an option for an in-lieu fee to mitigate adverse impacts to fish, wildlife, or botanical resources for activities authorized by a permit under IC 14-26-2, IC 14-28-1, or IC 14-29-1. Effective 30 days after filing with the Publisher.

312 IAC 9.5

SECTION 1. 312 IAC 9.5 IS ADDED TO READ AS FOLLOWS:

ARTICLE 9.5. IN-LIEU FEE MITIGATION

Rule 1. Purpose and Administration

312 IAC 9.5-1-1 Purpose of in-lieu fees

Authority: IC 14-10-2-4

Affected: IC 14-26-2; IC 14-28-1; IC 14-29-1

Sec. 1. (a) This article establishes an option to request an in-lieu fee to mitigate adverse impacts to fish, wildlife, or botanical resources if a permit is required under any of the following:

- (1) IC 14-26-2 and 312 IAC 11.**
- (2) IC 14-28-1 and 312 IAC 10.**
- (3) IC 14-29-1 and 312 IAC 6.**

(b) Mitigation under subsection (a) is made through the payment of funds to:

- (1) establish;**
- (2) restore; or**
- (3) establish and restore;**

habitat for fish or wildlife resources. (*Natural Resources Commission; 312 IAC 9.5-1-1*)

312 IAC 9.5-1-2 Administration of in-lieu fees

Authority: IC 14-10-2-4

Affected: IC 14-26-2; IC 14-28-1; IC 14-29-1

Sec. 2. The department's division of fish and wildlife shall administer this article. (*Natural Resources Commission; 312 IAC 9.5-1-2*)

Rule 2. Definitions

312 IAC 9.5-2-1 Applicability

Authority: IC 14-10-2-4

Affected: IC 14-26-2; IC 14-28-1; IC 14-29-1

Sec. 1. The definitions in 312 IAC 1 and this rule apply throughout this article. *(Natural Resources Commission; 312 IAC 9.5-2-1)*

312 IAC 9.5-2-2 "In-lieu fee" defined

Authority: IC 14-10-2-4; IC 14-28-1-5; IC 14-28-3-2

Affected: IC 14-26-2; IC 14-28-1; IC 14-29-1

Sec. 2. "In-lieu fee" means a payment to the Indiana Natural Resources Foundation to satisfy mitigation requirements under this article. *(Natural Resources Commission; 312 IAC 9.5-2-2)*

312 IAC 9.5-2-3 "Mitigation" defined

Authority: IC 14-10-2-4

Affected: IC 14-26-2; IC 14-28-1; IC 14-29-1

Sec. 3. "Mitigation" means action to eliminate, lessen, or replace the loss of environmental benefits and ecological functions if those benefits and functions are disturbed by human activities. *(Natural Resources Commission; 312 IAC 9.5-2-3)*

312 IAC 9.5-2-4 "Mitigation plan" defined

Authority: IC 14-10-2-4; IC 14-28-1-5; IC 14-28-3-2

Affected: IC 14-26-2; IC 14-28-1; IC 14-29-1

Sec. 4. "Mitigation plan" means a document that provides mitigation through any of the following:

- (1) The establishment, restoration, or a combination of the establishment and restoration of habitat for fish or wildlife resources.**
- (2) The use of an approved mitigation bank.**
- (3) Payment of an in-lieu fee.**

(Natural Resources Commission; 312 IAC 9.5-2-4)

Rule 3. Processing In-Lieu Fee Mitigation Requests

312 IAC 9.5-3-1 Requests for in-lieu fee

Authority: IC 14-10-2-4

Affected: IC 14-26-2; IC 14-28-1; IC 14-29-1

Sec. 1. (a) A person that applies for a permit under IC 14-26-2, IC 14-28-1, or IC 14-29-1 may request to use an in-lieu fee under this article.

(b) A person must submit the request on a departmental form to the division of fish and wildlife.

(c) To qualify for approval, the terms proposed in a request must be commensurate with the amount and type of impact that is associated with the project authorized by the permit and must include the following information:

- (1) Steps taken to avoid and offset or minimize impacts at the project site.**
- (2) The reasons for a request to use an in-lieu fee compared to other mitigation, including an explanation of the inability to do mitigation on-site or within the same 8-digit hydrologic unit code area.**
- (3) A floristic quality assessment of the project site.**

(Natural Resources Commission; 312 IAC 9.5-3-1)

312 IAC 9.5-3-2 Department evaluation of in-lieu fee request

Authority: IC 14-10-2-4

Affected: IC 14-26-2; IC 14-28-1; IC 14-29-1

Sec. 2. (a) The department shall review a request for an in-lieu fee based on the following:

- (1) The size and location of a project.**
- (2) Steps the permit applicant proposes to avoid and minimize or offset impacts to fish, wildlife, or botanical resources.**
- (3) Quality or rareness of habitat to be impacted.**
- (4) The level of impact to fish, wildlife, or botanical resources.**
- (5) The fee is an amount approved by the commission.**

(b) The department shall not approve in-lieu fee mitigation if any of the following applies:

- (1) At the project site, an endangered, threatened, or rare species exists that is listed in the "Roster of Indiana Animals, Insects, and Plants that Are Extirpated, Endangered, Threatened, or Rare (also described as Special Concern)", Information Bulletin #2 (Sixth Amendment), published in the Indiana Register at 20140129-IR-312140023NRA.**
- (2) A rare natural community in the region would be adversely affected.**
- (3) The project site has a floristic quality assessment score of at least:**
 - (A) thirty-five (35); or**
 - (B) a mean C-value of three and one-half (3 1/2).**
- (4) Use of in-lieu fee mitigation is denied by a federal agency or by another state agency for the same project.**
- (5) The director determines successful mitigation is not feasible as a result of the financial impact or the location of the project.**

(c) The department may recommend modifications to a request for an in-lieu fee. (*Natural Resources Commission; 312 IAC 9.5-3-2*)

312 IAC 9.5-3-3 Department action on in-lieu fee request

Authority: IC 14-10-2-4

Affected: IC 14-26-2; IC 14-28-1; IC 14-29-1

Sec. 3. The department may approve, approve with conditions, or deny a request for in-lieu fee mitigation based on the evaluation described in section 2 of this rule. (*Natural Resources Commission; 312 IAC 9.5-3-3*)